

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CARL A. WESCOTT,

Plaintiff,

No. C 22-04651 WHA

v.

CHARLES DUNN, CHRISTOPHER
MERCER, and MERIDIAN
DEVELOPMENT GROUP, LLC,

Defendants.

**ORDER DISMISSING ACTION FOR
LACK OF PROSECUTION**

This action was filed in August 2022. No parties appeared for the initial case management conference on May 11, 2023, which led to an order to show cause why this action should not be dismissed for lack of prosecution (Dkt. No. 25). That order set a response deadline of June 1, 2023, which has come and gone without a response. The order to show cause also set a hearing for July 13, 2023. At the scheduled time for that hearing on that date, this action was called first. Just like the initial case management conference, no party was present. The action was called again at the end of an hour of proceedings in the rest of the calendar. Again, no one was present. The last activity from plaintiff is a letter dated February 9, 2023, providing an address for defendant Charles Dunn for service and stating that he was “still researching addresses for the other two Defendants” (Dkt. No. 21). No proof of service has ever been filed.

1 “It is within the inherent power of the court to sua sponte dismiss a case for lack of
2 prosecution.” *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984) (citing *Link v. Wabash R. Co.*,
3 370 U.S. 626, 639–30 (1962)). In determining whether an action should be dismissed for lack
4 of prosecution, a district court is required to weigh several factors: “(1) the public’s interest in
5 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
6 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits
7 and (5) the availability of less drastic sanctions.” *Henderson v. Duncan*, 779 F.2d 1421, 1423
8 (9th Cir. 1986). The first two factors weigh in favor of dismissal, as this action should not
9 linger on the docket particularly if plaintiff has not demonstrated any interest in pursuing it.
10 “District courts have inherent power to control their dockets and may impose sanctions,
11 including dismissal, in the exercise of that discretion.” *Hernandez v. El Monte*, 138 F.3d 393,
12 398 (9th Cir. 1998) (quoting *Oliva v. Sullivan*, 958 F.2d 272, 273 (9th Cir. 1992)). “The power
13 to invoke this sanction is necessary in order to prevent undue delays in the disposition of
14 pending cases and to avoid congestion in the calendars of the District Courts.” *Link*, 370 U.S.
15 at 629–32.

16 The third factor slightly weighs in favor of dismissal: while it appears no defendant has
17 been served, there is potentially mild prejudice to having an open action against them on the
18 public docket.

19 Likewise, the procedural posture of this action predetermines the final two factors to
20 weigh in favor of dismissal. There is no opportunity to resolve this action on its merits nor
21 apply other sanctions if it is simply not being pursued. Furthermore, this action is in its
22 infancy and dismissal shall be without prejudice, so the severity of such a sanction is
23 significantly mitigated in this context. “In cases involving sua sponte dismissal of an action,
24 . . . there is a closer focus on these two considerations.” *See Oliva*, 958 F.2d at 274 (citations
25 omitted). As the foregoing record shows, plaintiff has been given plenty of warning and
26 opportunities to explain himself regarding this impending outcome. This district court did
27 “warn the plaintiff of the possibility of dismissal before actually ordering dismissal.” *Hamilton*
28 *Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1430 (9th Cir. 1990) (citing

Malone v. U.S. Postal Serv., 833 F.2d 128, 132 (9th Cir. 1987)). Our court of appeals has explained:

[Plaintiff] still failed either to appear at the . . . show cause hearing, to file papers of opposition, or to ask for rescheduling of the hearing. On this record, it is difficult to comprehend what other measure would have caused [plaintiff] to act responsibly. Although Rule 41(b) dismissal is a drastic measure, it was appropriate in the face of such complete non-cooperation.

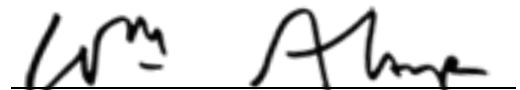
W. Coast Theater Corp. v. Portland, 897 F.2d 1519, 1524–25 (9th Cir. 1990). So too here.

Ultimately, “[a] dismissal for lack of prosecution must be supported by a showing of unreasonable delay.” *Henderson*, 779 F.2d at 1423 (citing *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1280 (9th Cir. 1980)). “Rule 4(m) provides for dismissal without prejudice where the complaint is not served upon the defendant within [90] days of filing.” *Hernandez*, 138 F.3d at 398 (citing FRCP 4(m)). That rule “suggests that service . . . is prima facie evidence of diligent prosecution.” *Ibid.* No such showing is present here, as we are approaching the one-year anniversary of the filing of this action without any evidence of service.

In light of the foregoing, this action is hereby **DISMISSED WITHOUT PREJUDICE** pursuant to FRCP 41(b). The Clerk **SHALL CLOSE THE FILE**.

IT IS SO ORDERED.

Dated: July 14, 2023.


 WILLIAM ALSUP
 UNITED STATES DISTRICT JUDGE